



# TASMANIAN OMBUDSMAN

## Freedom of Information Review under s.48 of the *Freedom of Information Act 1991*

- Provisions considered: ss 5, 7, 28, 29, 33

### MR PETER WELS & THE DEPARTMENT OF POLICE AND EMERGENCY MANAGEMENT

Case Reference: 0902-122

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## REASONS FOR DECISION

### 1. Background

On 19 December 2008, Peter Wels, a journalist with the Examiner newspaper, made a request under the *Freedom of Information Act 1991* (the FOI Act) to the Department of Police and Emergency Management (DPEM). His request was for –

*All correspondence – both email and non email – and notes of conversations relating to Director of Public Prosecutions Tim Ellis, Police Commissioner Jack Johnston and former Police Commissioner Richard McCreadie between August 14, 2008 to December 17 2008."* [sic]

The decision on the request was made by the Acting Commissioner of Police, Darren Hine, personally, by a letter to Mr Wels dated 23 January 2009. Mr Hine informed Mr Wels that some 85 pages of information had been identified as falling within the request, and that he did not intend to release any of it. He said that he had received legal advice that all of the information was exempt information, saying simply that the relevant exemptions were created by ss 27(1), 28(1), 29(1), 30(1) and 33(1) of the Act. No reasoning was provided to elaborate upon that assertion or to fulfill the requirements of s 22 of the Act.

Mr Wels wrote to me on 9 February 2009, seeking the review of this decision under s 48 of the FOI Act.

To better explain the background to the request and therefore this decision –

- Jack Johnston is the current Commissioner of Police for Tasmania, and is facing charges in the Supreme Court for alleged offences against s 110 of the *Criminal Code*. He stood down from his duties on 14 August 2008 pending the outcome of

what was then a police investigation, but was also subsequently formally suspended until the charges laid against him had been determined.

- Tim Ellis is the Director of Public Prosecutions for Tasmania, and held that post during the period covered by the request.
- Richard McCreadie was the Commissioner of Police for Tasmania prior to the appointment of Mr Johnston to that role in February 2008. The Premier of Tasmania, David Bartlett, announced on 16 October 2008 that Mr McCreadie would act as Commissioner whilst Mr Johnston was suspended, but then abandoned that intention on 20 October after a short period of controversy about the proposed appointment. In a media release of that date, the Premier stated –

*" ... I have now been informed by the Solicitor-General that there may be other issues affecting the appointment of Mr Richard McCreadie".*

## **2. Refining the request**

It seems very likely that, as drafted, the request could legitimately have been refused under s 20 of the FOI Act. The task of trawling all of the email and other correspondence and notes of conversations held by DPEM for the period from 14 August 2008 to 17 December 2008 for all references to the three named men would have been huge, unless limited in some way. Jack Johnston stood down from duty on 14 August 2008, but by reason of his position as Commissioner of Police might be expected to be mentioned in countless instances of no likely interest to Mr Wels. Similarly, there would have been a very large number of occasions in which the DPP would have been mentioned in correspondence and notes of conversations held by DPEM for the relevant period, by reason of the frequent exchanges which routinely occur between the Police Department and the DPP. One might reasonably have assumed that Mr Wels had no interest in the bulk of that material, but was seeking information relevant to the events of significance that I have mentioned above, and DPEM seems to have made such an assumption in identifying the 85 pages of information as falling within the request.

The difficulty created by the width of the request should have caused DPEM to consult with Mr Wels under s 20(4) of the Act, with a view to removing the potential grounds for refusal.

Under s 48(4) of the FOI Act, I have the same power when considering an application for review as the agency had at the time of considering the request. I therefore contacted Mr Wels, and met with him on 16 April 2009 to discuss what he was seeking. I then sent him an email that same day stating that I saw his request as being for –

*All file notes, emails and other correspondence in the possession of the Department of Police and Emergency Management which relate to –*

*the conduct of Jack Johnston towards other police officers and other officers of the Department at any time after he was informed in August 2008 that he was under investigation in relation to alleged breaches of s 110 of the Criminal Code; and the possibility that Richard McCreadie might be appointed to act as Commissioner of Police after Mr Johnston stood aside from that office on 14 August 2008.*

Mr Wels confirmed by email that day that he was content with this restatement.

I then sought confirmation from DPEM that I had all of the documents that fell within this wording. The documents which they had earlier identified as falling within the request had been delivered to me on 1 April. A further document had also been provided at my request, on 9 April.

Mark Miller, Principal Legal Officer with Tasmania Police, wrote to me on 24 April, saying that I had all of the documentation, if the request as modified by me was still confined to the period specified in the original request. I have since checked with Mr Wels, and he accepts my view that it should be.

Hence, this review is of all the information provided to me by DPEM, details of which are provided in the Schedule. The review has been conducted in light of the terms of the request as reframed above, taking that request as only seeking records which arose between 14 August 2008 and 17 December 2008.

### **3. The review**

The documents provided by DPEM have been numbered for the purposes of the Schedule.

Some document numbers are in bold font. These are ones in respect of which some explanation is needed, as set out below.

Those numbers which have not been highlighted represent documents which either fall outside the scope of the request, or in respect of which there is patently no possible ground of exemption (Nos. 12 and 37).

I explain my decision in relation to the highlighted documents as follows –

1. These are handwritten notes made by the Acting Commissioner of Police, Darren Hine, of certain events over 15 and 16 October 2008. Mr Miller told me of these notes when he delivered the other documents to me on 1 April 2009, and I asked that the notes be provided to me. Mr Miller said that Mr Hine regarded them as his personal notes, not records of DPEM. He said that Mr Hine had stored them in a drawer beside his desk in his work office.

The notes were provided to me by Mr Miller with a letter dated 9 April 2009. In that letter, he said this –

*"As I informed you on 1 April 2009, the notes were not delivered with my memorandum of that date as they were considered to be Mr Hine's personal notes rather than records of the Department. The notes in question were taken by Mr Hine to assist him with his memory of the meeting. They have not been placed on any Departmental file nor referred to in any Departmental record. Mr Hine is of the view that he is free to destroy them at any time if he so wishes."*

The notes essentially record the progress of Mr Hine's knowledge of the proposal that Richard McCreadie return to act as Commissioner of Police, from a phone call on the afternoon of 15 October 2008 through to another phone call on the morning of 16 October. The centrepiece of the notes is a record of a meeting between Mr Hine and the Premier on the morning of 16 October 2008.

I wrote to Mr Hine with various questions about the notes. In a letter of 30 June 2009, he informed me, amongst other things, that –

- he made the notes to assist his memory in the event that he was ever called upon to recall the conversation that occurred – by which I infer that he meant the conversation with the Premier;
- he made them on the night of 16 October 2008;
- he stored the notes at home, but brought them to work to refresh his memory prior to attending [information deleted];
- he kept the notes with other personal papers whilst they were at work; and
- he did not believe that anyone other than Mr Miller knew of the notes' existence.

I agree with the proposition in Mr Miller's letter of 9 April 2009 that Mr Hine would have been free to destroy the notes at any time, if he had so wished. They are not on their face records "in respect of the business of the Government department" within the meaning of s 10(1)(a) of the *Archives Act 1983*. There is no evident reason why the notes should have been kept for the purposes of the Department, but the content of the notes is such that Mr Hine might understandably have wanted to keep them for his own reasons.

I am satisfied that the notes were not in the possession of the agency, within the terms of s 7 of the FOI Act, at the time of the processing of the request, but were then in Mr Hine's personal possession. They therefore fall outside the Act.

2, 4, 5, 6, 7, 8, 13, 21, 23, 39

Mr Johnston has been committed to stand trial in the Supreme Court. There are two charges, which can be broadly stated as being that he disclosed official secrets to the former Premier, Paul Lennon, in April 2008 in relation to a police investigation into allegations of impropriety surrounding the appointment of the Solicitor-General. The charges are of offences under s 110 of the *Criminal Code*.

The case has not surprisingly attracted a great deal of publicity.

All of these documents include allegations about what Mr Johnston said and did on 14 August 2008 – the day on which he made his decision to stand down – and subsequently. I am of the view that the release of this information at this time would be reasonably likely to prejudice a fair trial, and the impartial adjudication of the case, and that the information is therefore exempt under ss 28(1)9a)(iii) and (iv). It would for obvious reasons be inappropriate for me to provide details of the contents of the documents in these reasons.

I note that none of the exceptions in s 28(2) applies.

- 13 This is a letter from Mark Miller, Principal Legal Officer with Tasmania Police, to the Solicitor-General. The letter is not exempt under s 29, as being covered by legal professional privilege, for it is clear from its contents that it was not sent with the purpose of giving or obtaining legal advice. The contents of the letter indicate that it was sent on Mr Miller's initiative to inform the Solicitor-General, as the principal legal advisor to the Crown, of certain matters relating to the involvement of Mr Ellis in the Johnston investigation, the recommendation by Mr Ellis that Mr Johnston be charged, and the proposed appointment of Mr McCreadie. In so far as it deals with this last matter, the letter falls within Mr Wels' request. It will be noticed that the letter was written two days after the Premier publicly announced that he had decided, on advice from the Solicitor-General, that the proposed appointment of Mr McCreadie should not proceed.

The letter is exempt from release under s 33(1)(b) of the Act.

For that provision to apply –

- the information must have been communicated in confidence; and
- it must be the case that the disclosure of the information would be contrary to the public interest because such disclosure would be reasonably likely to impair the ability of an agency or Minister to obtain similar information in future.

A number of factors in combination satisfy me that the information in the letter was communicated in confidence. These are – the content of the letter; the temporal and factual context within which the letter was written; the respective roles of the writer and addressee and their relationship to the events in question; and the involvement of the Solicitor-General, as the principal advisor to the Crown, in advising the government on the issues contained in the letter.

I am also satisfied that the disclosure of the information would be contrary to the public interest on the required ground. The Solicitor-General occupies a central, independent role within Government. Not only does he provide advice to Government on request, but on occasions he needs to proffer advice on his own initiative, potentially directly to the Governor of the day, on matters of both law and governance which come to his notice. He necessarily had a central role in advising Government in relation to the matters mentioned above as having been the subject-matter of Mr Miller's letter, particularly the role and conduct of Mr Ellis, another independent law officer of the Crown. The disclosure of this letter could potentially make it less likely that officers such as Mr Miller proffer information in writing to the Solicitor-General which he needs to know about if he is to effectively carry out his functions. That would risk making the Solicitor-General less effective, and that would be contrary to the public interest.

The Solicitor-General is thus the relevant "agency" for the application of s 33(1)(b) in this instance. That expression is defined in s 5(1) of the FOI Act to include a "prescribed authority", and the Solicitor-General falls within para (d) of the definition of that expression in the same section.

16 This is a letter from D G Coates SC to the Acting Commissioner of Police. It is exempt from release under s 29 of the FOI Act, in that it would be privileged from production in legal proceedings on the ground of legal professional privilege. This is because the letter was sent for the dominant purpose of the provision of legal services, relating as it did to the carriage by Mr Coates of the prosecution of Mr Johnston.

14, 15, 34, 35

Each of these documents is exempt under s 29 of the FOI Act, for each would be privileged from production in legal proceedings on the ground of legal professional privilege. The documents contain confidential communications between Mr Miller and the Solicitor-General made for the dominant, indeed sole, purpose of giving or obtaining legal advice.

38 This document is a copy of a briefing note from Mr Johnston to the Minister for Police and Emergency Management dated 14 August 2008. The contents show that it was provided prior to Mr Johnston's decision that same day to stand down. No exemption under the FOI Act applies to this document. In particular, I can find no basis for saying that the disclosure of the document would be reasonably likely to prejudice Mr Johnston obtaining a fair trial, or to prejudice the impartial adjudication of his case.

#### **4. Conclusion**

DPEM should now release to Mr Wels, in compliance with s 48(7) of the FOI Act, each of Documents 12, 37 and 38, listed in the Schedule. The remainder of the information at issue is either outside the scope of the request or exempt from release.

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**SIMON ALLSTON**  
**OMBUDSMAN**

**DATED: 10 JULY 2009**